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In the Supreme Court of the United States

OCTOBER TERM, 1979

LEON BLEVINAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 607 F. 2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1979. The petition for a writ of certiorari was filed on January 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court coerced a verdict by its instructions.

2. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371, and three substantive firearms offenses. The firearms offenses were (1) dealing in firearms without a license, in violation of 18 U.S.C. 923 and 924; (2) engaging in business as a firearms dealer in places for which a separate licensing fee had not been paid, in violation of 18 U.S.C. 923(a) and 924; and (3) exporting arms and implements of war without registering, in violation of 22 U.S.C. (1970 ed.) 1934. He received concurrent sentences of four years' imprisonment for the conspiracy and the first two substantive offenses, and a concurrent two-year sentence for unlawfully exporting arms and implements of war. The court of appeals affirmed with one judge dissenting (Pet. App.).

1. The evidence showed that petitioner, an American citizen residing in Canada, entered into a firearms distribution scheme with co-defendants Patrick Harrell and Theodore Harrell, residents of Georgia.[1] The group intended to purchase firearms in Georgia and Florida and transport them for resale into Canada. Pursuant to the scheme, three lots of handguns were purchased. The first lot was purchased by Patrick Harrell with money that petitioner wired to him from Canada (I Tr. 58-60, 153); Harrell executed an ATF Firearms Transaction Record (Form 4473) indicating that he was the ultimate purchaser of the weapons (I Tr. 60; D.X. G-1-A). A week after the purchase, petitioner and a companion came to Georgia, where the weapons were packed into suitcases, loaded into the trunk of petitioner's automobile, and then

[1]The Harrells both pleaded guilty to the conspiracy count, and Patrick Harrell testified as a government witness.

transported back to Canada (I Tr. 62-64, 134-135). At the time of this transaction, neither petitioner nor Patrick Harrell was licensed as a dealer in firearms, and at no time were they or Theodore Harrell licensed to export firearms to Canada (II Tr. 53-54).

The second lot of firearms was purchased through Theodore Harrell, who had at that point obtained a firearms dealer's license. On the basis of the license, an account was opened with a gun supply company in Miami, Florida (I Tr. 65-66). Firearms were ordered from the gun supply company in accordance with specifications received from petitioner (I Tr. 67). Patrick Harrell put up a $1000 deposit when the account was opened, using money petitioner had given him from the proceeds of the sale of the first lot of firearms (I Tr. 66). Petitioner wired Patrick the money to be used to pay the balance when the order was received from the Miami company (I Tr. 68). When the firearms were received, Patrick executed ATF Form 4473, indicating that he was the ultimate purchaser of the weapons from Theodore (I Tr. 116). Petitioner was visiting Patrick at the time (I Tr. 70); subsequently, under petitioner's direction, petitioner and Patrick took the weapons to Jacksonville, Florida, where they boxed them and placed them in a motor home driven by an unidentified individual (I Tr. 70-74). Some of the weapons from this order, as well as some from the first order, were subsequently recovered by law enforcement officials in Canada (II Tr. 21-30, 45-52).

The third lot of firearms was also ordered from the Miami company (I Tr. 81-82). Except for certain weapons that the Harrells intended to keep for themselves, this lot was purchased for resale in Canada by petitioner (I Tr. 85-86). The weapons were eventually seized by government agents (I Tr. 256-257).

2. At the beginning of trial, the court informed the jurors that they could expect to stay in session until approximately 5:15 or 5:30 p.m. each day and that the trial should last three days (I Tr. 37-38). The jury began its deliberations after lunch on the third day. When no verdict had been reached shortly before 6:00 p.m., the court called the jurors to the courtroom and instructed them as follows (II Tr. 236-237):

> Now, members of the Jury, I know you have not yet reached a verdict in this case and as I told you on Monday morning about generally how we operate and so on but of course I didn't go into how we operate if we got into a situation like this where we did not have a verdict late in the day. So, I want to be sure you understand how we intend to operate. We, of course, have spent three days already on this case. We have no intention of giving up on it. I want you to understand that. We have no intention of giving up on it. So, what I intend to do is, it's now about five minutes to six or something like that. If you have not made a verdict by say six forty-five it would be my intention to let you go home and come back in the morning and resume your deliberations in the morning because as I say we don't have any intention of giving up on the case. We intend to get a verdict. So, what I suggest to you, that you do now is you go back to the Jury Room and resume your deliberations and if you can reach a verdict by six forty-five that's fine. If you cannot then we will come back in the morning and resume the deliberations after you have had a night's rest.
>
> I don't want you to feel that you are under any pressure at all to reach a verdict. I just simply wanted you to know how we intended to operate. So, I suggest now that you go back to your Jury Room and resume your deliberations. We will follow that general course.

Petitioner, objecting that the phrase "We do not intend to give up" could carry a connotation of "forever and ever," asked the court to instruct the jurors not to surrender convictions honestly held and to inform them that a mistrial was an option if they could not reach a verdict in a reasonable time. The court, stating that it had neither suggested that "anybody give up any conviction of any kind" nor implied that the case would never be given up, declined to suggest the possibility of a mistrial or give any other further instruction (II Tr. 237-238). The jury deliberated for another forty-five minutes and was then excused for the night. After one and one-half hours of deliberation the next morning, the jury returned a verdict of guilty on all counts (Pet. App. 4a).

3. The court of appeals found no indication that the jury was having difficulty reaching a verdict at the time that the court's remarks were made, and it interpreted those remarks as an attempt to give the jury guidance as to adjournment time rather than as a reflection of concern that the jury might not be able to reach a verdict. It interpreted the language concerning not giving up as nothing more than an effort to inform the jurors that they could have as long as they needed to reach a verdict, and it found that any coerciveness in the language was ameliorated by the trial court's further statement that "I don't want you to feel that you are under any pressure at all to reach a verdict." Considering "the totality of circumstances and the language used," the court of appeals concluded, with one judge dissenting, that the trial court's words did not coerce the jury (Pet. App. 5a-6a).

ARGUMENT

1. The decision of the court of appeals on the jury coercion question, representing its assessment of the effect of the particular language used in "the totality of circumstances," is a fact-bound determination that does not warrant review by this Court. Even more clearly, it does not, as petitioner suggests (Pet. 7-8), afford an occasion for determining acceptable limits for "*Allen*-type charges." The statements in question were not made in response to any suggestion of jury impasse and did not focus upon jurors holding minority views. Thus, as the dissent acknowledged (Pet. App. 8a), the case "does not fit the *Allen* mold."[2]

In any event, the holding of the court of appeals on the coercion issue was correct. Even assuming that the particular language complained of by petitioner might have tended to persuade the jurors that they were obligated to reach a verdict, such an impression would have been dispelled by the trial court's direct statement that they were *not* to feel "under any pressure at all to reach a verdict." And, at no time during its deliberations did the jury indicate that it was experiencing difficulty in reaching agreement.

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[2]Moreover, even cases that do fit that mold have not been deemed deserving of review by this Court. See, *e.g.*, *United States* v. *Giacalone*, 588 F. 2d 1158, 1166-1167 (6th Cir. 1978), cert. denied, 441 U.S. 944 (1979); *United States* v. *Weiner*, 578 F. 2d 757, 764-765 (9th Cir.), cert. denied, 439 U.S. 981 (1978); *United States* v. *Carter*, 566 F. 2d 1265 (5th Cir.), cert. denied, 436 U.S. 956 (1978); *United States* v. *Dyba*, 554 F. 2d 417 (10th Cir.), cert. denied, 434 U.S. 830 (1977); *United States* v. *Lee*, 509 F. 2d 645 (2d Cir.), cert. denied, 422 U.S. 1044 (1975). Thus the circuits have been permitted to adopt varying versions of the *Allen* charge rather than being required to adhere to a single particular text.

2. Petitioner makes two contentions regarding the sufficiency of the evidence. First, he argues (Pet. 10) that the government offered no testimony to prove that the handguns offered into evidence fit the definition of "firearm" set forth in 18 U.S.C. 921(a)(3). This contention is without merit. The statutory definition provides, in pertinent part, that a firearm is "any weapon * * * which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." As the court of appeals noted (Pet. App. 8a), the jurors were permitted to examine particular handguns described in the indictment.[3] In addition, invoices describing the weapons were admitted into evidence (see 1 Tr. 157, 177), and ATF forms were executed as to all of the weapons. Such evidence provides a sufficient basis for the jury's conclusion that petitioner trafficked in "firearms" within the statutory definition. See *United States* v. *Liles*, 432 F. 2d 18, 19-20 (9th Cir. 1970).

Second, petitioner asserts (Pet. 12-13) that he testified "without contradiction" that he entered into a "legitimate" gun business with his co-defendants, in which he served merely as the financier. On the basis of this he contends that the hypothesis was not excluded that he personally had "engaged in a legitimate business" without "knowledge or participation in any wrong doing on the part of his co-defendants" (Pet. 13). The short answer to this contention is that an individual who participates in the business of selling firearms has an absolute duty to

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[3]Petitioner's conviction rested both on the handguns introduced into evidence (those from the third lot seized by government agents and those recovered by Canadian law enforcement officials from the first and second lots) and on unrecovered weapons in the first and second lots described in documentary evidence.

make certain that the business is properly licensed. *United States* v. *Freed*, 401 U.S. 601, 609-610 (1971). Petitioner was not privileged to obtain the financial benefits of exporting firearms to Canada for resale, while relying on others to obtain the licenses necessary to legitimate the transactions. Moreover, petitioner's claim that he acted solely as a financier is belied by Patrick Harrell's testimony concerning petitioner's active participation in the transshipment of the weapons. Petitioner disputed Harrell's testimony in this regard, but the jury was not required to believe him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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